IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 32.

UNITED STATES OF AMERICA,
Appellant,

vs.

A & P TRUCKING CO., a partnership composed of ALEX SCHUB, ALDO IAFRATE, and ARTHUR CLOUGH; and SOL LIEBMAN,
Appellees.

UNITED STATES OF AMERICA,
Appellant,

vs.

HOPLA TRUCKING COMPANY, a partnership composed of WILLIAM LEVINE and MELVIN ULRICH,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR THE APPELLEES.

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TABLE OF CONTENTS.

Cases Cited.

FEDERAL STATUTES.

FEDERAL RULES OF CIVIL PROCEDURE.

New Jersey Statute.

Constitution—State of New York.

Other Authorities.

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Opinion Below.

The District Court did not write an opinion. In the Orders dismissing the informations, the court held that the Defendant partnerships as entities are not subject to criminal liability. The Orders dismissing the informations are set forth at R. 19 and R. 27.

Jurisdiction.

The Jurisdictional requirements are set forth in the government's brief pages 1 and 2.

Question Presented.

Whether a partnership is a legal entity separate from the partners for the purpose of criminal liability under the following statutes: (1) Section 222 (a) of the Motor Carrier Act (provides penalty for any person knowingly and willfully violating certification requirements and of I. C. C. motor carrier regulations); and (2) 18 U. S. C. 835 (provides penalty for whoever knowingly violates regulations governing the safe transportation of explosives and other dangerous articles).

Statutes Involved.

1. The Interstate Commerce Act, Part II (Motor Carrier Act of 1935, 49 Stat. 543, as Amended), provides in pertinent part:

Section 222 (a) 49 U. S. C., Supp. V, 322 (a):

> Any person knowingly and willfully violating any provisions of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate permit, or license, for which a penalty is not otherwise herein provided, shall upon conviction thereof, be fined not less than $100.00 nor more than $500.00 for the first offense and not less than $200.00 nor more than $500.00 for any subsequent offense. Each day of such violation shall constitute a separate offense.

Section 206 (a) 49 U. S. C. 306 (a):

> (1) Except as otherwise provided in this section and in section 210 a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: • • •

Section 203 (a) 49 U. S. C. 303 (a):

> As used in this part • • •
>
> (1) the term "person" means any individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes any trustee, receiver, assignee, or personal representative thereof.

2. 18 U. S. C. 835 provides in pertinent part:

> The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles • • • which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land • • •.
>
> • • •
>
> Whoever knowingly violates any such regulation shall be fined not more than $1,000.00 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000.00 or imprisoned not more than ten years or both.

3. 1 U. S. C. 1 provides in pertinent part:

> In determining the meaning of any Act of Congress, unless the context indicates otherwise • • •

* * *

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

* * *

4. Section 207 (a) 49 U. S. C. 307 (a):

Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied; * * *[1]

Statement.

On July 5, 1956, an information was filed against A. & P. Trucking Co., a partnership composed of Alex Schub, Aldo Iafrate, and Arthur Clough; and Sol Liebman, in count 1 with violations of Interstate Commerce Commission regulations pertaining to transportation of dangerous articles in interstate commerce with respect to a single shipment on or about March 18, 1954, under 18 U. S. C. 835; in count 2, with a single violation of Section 222(a) of the Motor Carrier Act of 1935, *supra*, alleging that on or

[1] Section 207 (a) 49 U. S. C. 307 (a), presented for the first time and was not part of the original statutes involved.

about March 18, 1954 the company permitted the operator to drive without having been physically examined and certified in conformance with I. C. C. regulations; in count 3, with a violation of Section 222(a) on or about March 18, 1954 for failure to equip a truck with a fire extinguisher with respect to a single shipment; and in counts 4-35, with violating Section 222(a) relative to having a certificate of convenience and necessity required by section 206(a); (R. 1-15).

The two-count information, against Hopla Trucking Company, a partnership composed of William Levine and Melvin Ulrich, filed July 6, 1956, charged the partnership with violations of regulations of the Interstate Commerce Commission of two shipments 11 Oct. 1955 pertaining to the transportation of corrosive liquids in interstate commerce under 18 U. S. C. 835 (R. 23-24).

On November 14, 1957, counsel for the defendants made a motion to quash the informations in that Section 222(a) 49 U. S. C. Supp. V. 322(a) (*supra*, p. 2) punishes any • • • person knowingly and willfully violating • • • and 18 U. S. C. 835 (*supra*, p. 3) "whoever knowingly violates."

The government conceded that the individual partners did not have personal knowledge of the facts out of which the violations arose.

It was argued on briefs in the United States District Court, District of New Jersey, by Anthony J. Cioffi, of Counsel for August W. Heckman, Esq., attorney for the defendants, that a Partnership is not a legal entity separate from the partners for the purposes of criminal liability and that knowledge of an agent or employee of the partner-

ship is not imputable to the partnership as an entity so as to hold the employer criminally responsible under the statutes in question.

The district Court by Order dismissed the informations on November 13, 1957, holding that the Defendant Partnerships as entities are not subject to criminal liability (R. 27-28).

A notice of appeal to this court was filed in the United States District Court for the District of New Jersey on December 9, 1957, alleging Jurisdiction under 18 U. S. C. 3731. This Court noted probable jurisdiction on March 31, 1958.

Summary of Argument.

1. The key to the construction of Section 222 (a) of the Motor Carrier Act (*supra*, p. 2) is the meaning of the words "person", "knowingly", and "willfully" read in conjunction with Section 203 (a) of the Motor Carrier Act (*supra*, p. 3) with the word "copartnership".

2. The key to the construction of 18 U. S. C. 835 (*supra*, p. 3), is the meaning of the words "whoever", and "knowingly" read in conjunction with the word "partnership" in 1 U. S. C. 1 (*supra*, p. 3-4).

Section 203 (a) of the Motor Carrier Act and 1 U. S. C. 1 does not define the relationship. Consequently the word "copartnership" and "partnership" must be given their plain established meaning since there is no contrary congressional intent expressed in Section 222 (a) of the Motor Carrier Act or in 18 U. S. C. 835.

Both these statutes deal with violations of Interstate Commerce Regulations and Congress has used the word "knowingly"[2] and "willfully"[3] in said statutes. It has set forth a state of mind essential for responsibility and has removed the statutes from the classification of offenses familiarly known as offenses malum prohibitum or public welfare offenses. *U. S.* v. *Chicago Express Inc.*, 235 F. 2d 785 (C. A. 7, 1956). Since both of the statutes require culpable intent they will be discussed together.

The requirement of a specific criminal intent as an essential element of the crime under 18 U. S. C. 835 manifests a Congressional purpose to punish "only those who knowingly violate the regulations." *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337 (p. 342). The government asserts from a mere examination of 1 U. S. C. 1, and Sec. 203 (a), that a partnership is an entity separate from the partners who comprise it. Such contention is contrary to the substantive nature of a partnership in both civil and criminal law and conflicts with the well-established principles regarding vicarious criminal responsibility. In criminal law guilt is personal and as to non-corporate employers, such an appellee, there can be no vicarious criminal liability. The adoption of the government's construction of 18 U. S. C. 835 and Sec. 222 (a) Motor Carrier Act, would make wide-sweeping changes in the substantive law of partnership without any statutory basis therefor.

3. A partnership is not a legal entity for the purposes of criminal liability under 18 U. S. C. 835 and Section 222 (a) Motor Carrier Act. The cases cited by the govern-

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[2] Mens Rea—Intent and Capacity—Chap. 38. Clark and Marshall, Crimes —Fourth Edition—Kearny (1940), sections 40, 41.

[3] Willfulness—Section 42—id.

ment do not apply either to the construction of said statutes or to the facts in the case at bar.

The government has failed to offer any authority in substantive law for considering a partnership as an entity separate from the partners who comprise it. Rule 17(b) of the Federal Rules of *Civil* Procedure is limited solely to the procedural purpose of facility of civil suit. *Koons* v. *Kaiser*, 91 F. Supp. 511 (S. D. N. Y.). Similarly, the procedural treatment of a partnership as an entity under the Bankruptcy Act does not change the substantive nature of that relationship. *Mason* v. *Mitchell*, 135 F. 2d 599 (C. A. 9).

The cases treating labor unions and trade associations as entities are not applicable to partnerships since unincorporated associations of that type partake of various characteristics of corporations. *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344.

The case of *United States* v. *Adams Express Co.*, 229 U. S. 381, involved a joint stock company, which, under the constitution and laws of the State of New York, was regarded as a corporation. This court relied heavily upon such fact in holding the Adams Express Company amenable to criminal liability in that case. In addition, the statute involved in the *Adams* case differed so substantially from the statutes in question as to afford no support for the government's position in the case at bar.

The government erroneously presumes that once an organization has been established as an entity, irrespective of the requirement of proof of a specific criminal intent in a statute, that vicarious criminal liability would automatic-

ally flow. The government fails to cite any authority for this proposition. Quite to the contrary, the decisions under federal law have refused to extend vicarious criminal responsibility beyond corporations. *Brotherhood of Carpenters and Joiners* v. *U. S.*, 330 U. S. 395.

The law in relation to partnerships is well-settled. A partnership is not a separate entity but is the individual partners. The only way to prove criminal intent in a partnership is to prove that the individual partners had the guilty knowledge required by the criminal statute involved herein.

4. The government seeks to create a fictional entity out of a simple partnership solely for the purpose of eliminating the necessity of proving guilty knowledge in the individual partners, so that it can attribute to them the vicarious criminal responsibility imposed upon a corporation. The government has conceded that the individual partners had no knowledge of the alleged violations and the case at bar was dismissed upon such concession by the government.

Only Congress can change the nature of the crime under Sec. 222 (a) of the Motor Carrier Act and 18 U. S. C. 835 by eliminating the element of a specific criminal intent. *St. Johnsbury Trucking Company* v. *United States*, 220 F. 2d 393, 398 (C. A. 1). The government may not accomplish such a change by a judicial interpretation.

The criminal responsibility of a partnership is identically the same as that of an individual conducting business under a trade name except that instead of one individual doing business under a trade name it is two or more doing so. Otherwise, individual partners could always set up the defense that the partnership entity is criminally

liable and thus avoid imprisonment. The government's assertion that the partnership can only be punished by a fine as to 18 U. S. C. 835 is clearly contrary to established criminal law. Furthermore, it is obvious that as to Sec. 222 (a) Motor Carrier Act (government brief pp. 10-11) if a supposed partnership entity did not have sufficient assets to satisfy a fine, the government would then surely proceed against the assets of the individual partners for satisfaction of the balance.

Because of the nature of a partnership, a conviction of the partnership would carry the stigma of a criminal conviction against the partners themselves. Under the circumstances, the individual partners, who had no knowledge of the alleged violations are placed in the anomalous position of attempting to defend their good names without even the safeguard of being directly named as defendants.

5. The question involving as to whether criminal proceedings could not be brought against a partnership as an entity was before this court in *United States* v. *American Freightways Co.*, 352 U. S. 1020 (1957).

This brief in essence sets forth the arguments propounded by Martin Werner, Esq., attorney for American Freightways.

When the American Freightways case was before this Court, an equally divided Court affirmed the District Court's order dismissing an information returned against a partnership (Governments Brief, pp. 12, 23, 24).

The District Court in the American Freightways case, by decision and order dated May 1, 1956, granted defendants' motion to dismiss the information against the partnership as an entity and held:

"Regardless of the wording of Title 1 U. S. C. Section 1 and Title 49 U. S. C. Section 303 (1) and despite the various cases cited by the government dealing with criminal responsibility attaching to unincorporated associations, it is the opinion of this court that a partnership is not a legal entity for purposes of criminal liability herein.

While criminal liability may lie against the individual partners, it may not lie against the partnership as an entity."

In a per curiam opinion, this Court affirmed the judgment of dismissal of the information by the lower Court.

ARGUMENT.

POINT I.

A partnership is not a legal entity separate from the partners for purposes of criminal liability under Section 222(a) Motor Carrier Act and 18 U. S. C. 835, which "punishes only those who knowingly violate the regulations."

(a) This court has decided the issue as to "knowledge."

In an appeal to this Court under 18 U. S. C. 3731, from an order of a district court dismissing an indictment or information, the jurisdiction of this Court is limited to a construction of the sections in question, i. e., Section 222 (a), Motor Carrier Act and 18 U. S. C. 835. *United States* v. *Hood*, 343 U. S. 148; *United States* v. *Beacon*

Brass Co., Inc., 344 U. S. 43; *United States* v. *Carroll*, 345 U. S. 457.[4]

A necessary element of the violation is the guilty knowledge on the part of the accused, and in order to arrive at the real intent of Congress in enacting that section the term "whoever" must be read in conjunction with the word "knowingly". This was made clear in the cases of *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337; *United States* v. *Chicago Express, Inc.*, 235 F. 2d 785 (C. A. 7) and *St. Johnsbury Trucking Company* v. *United States*, 220 Fed. 2d 393 (C. A. 1). In the *Boyce* case, *supra*, this Court stated (p. 342):

> "The statute punishes only those who knowingly violate the Regulation" and that "* * * the presence of culpable intent * * *" is "* * * a necessary element of the offense. * * *"

(b) A partnership is not a separate entity.

In the absence of a clear expression of Congressional intent to the contrary, we must give the word "partnership" its plain ordinary meaning. This is especially so in interpreting a criminal statute which must be strictly construed in favor of the accused.[5]

There can be no doubt that the common law was based on the aggregate rather than the entity theory of the nature of a partnership. This is stated even by sponsors of the

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[4] See Sutherland, *Statutes and Statutory Construction* (3d Ed., 1943), vol. 3, Secs. 5303, 5304, *et seq.*

[5] Cf. *United States* v. *A & P Trucking Corp.*, 113 F. Supp. 549 (D. C. N. J.), involved an interpretation of the regulations promulgated under 18 U. S. C. 835. The court ruled that canons of construction applicable to statutes are equally applicable to such regulations.

entity theory. See Crane, *Partnership* (2nd Ed. 1952), pp. 9-12. Unlike a corporation, a partnership at common law has no legal existence aside from the members who compose it.[6]

It is equally clear that the Uniform Partnership Act adopted the common law or aggregate theory of a partnership. This is borne out by the case of *Helvering* v. *Smith*, 90 F. 2d 590 (C. A. 2), wherein the court, in discussing the substantive nature of a partnership stated (p. 591):

> "The Uniform Partnership Act which is the law of New York (Partnership Law N. Y. (Consol. Laws N. Y. c. 39)) did not, as the taxpayer supposes, make the firm an independent juristic entity."

It is no coincidence that in federal criminal cases dealing with criminal acts committed for the benefit of partnerships the prosecution proceeded with an indictment of the individual partners. The state court decisions are in accord with appellee's position as to the nature of a partnership in criminal law. In *People* v. *Schomig*, 74 Cal. App. 109; 239 P. 413 (1925), the defendant contended that an act was unconstitutional for the reason that penalties were prescribed in the act for the punishment of individuals and corporations but none as to partnerships and that therefore partnerships were exempt from punishment altogether. The Court stated (239 P. 413) at p. 414:[7]

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[6] Hence, the definition of a partnership under the Uniform Partnership Act (7 U. L. A., Section 6), reads: "An Association of two or more persons to carry on as co-owners a business for profit."

[7] *Gordon* v. *United States*, 347 U. S. 909; *United States* v. *Cohn*, 128 Fed. 615; (S. D. N. Y.); *People* v. *Maljan*, 167 P. 547.

"In reference to copartnerships it will be noted that penalties are prescribed by the act for the punishment of individuals and corporations, but none as to copartnerships. We are of the opinion, however that this omission does not affect the constitutionality of said act for the reason that in so far as criminal responsibility is concerned, a partnership is not recognized as a person separate from its component members in the sense that a corporation is a separate entity (People *v.* Maljan, 34 Cal. App. 384 (167 Pac. 547)), and therefore cannot commit a crime. California Jurisprudence (Vol. 20, p. 680) states the rule in the following language: 'In most respects a partnership is but a relation, with no legal being as distinct from the members who comprise it. It is not a person, either natural or artificial. Thus a partnership as such, cannot be guilty of crime, but guilt attaches to the delinquent member or members' * * *. True, it has been held that a partnership may be regarded as a separate entity for some purposes (citations omitted), but those purposes are entirely disassociated with the question of responsibility for the commission of criminal acts; *and our attention has not been called to any case wherein a copartnership has been treated as a 'person' and thus subjected to punishment for committing a criminal act.* * * * " (Emphasis supplied.)

It does not follow, though, from the fact that the partnership itself as a separate entity may not be punished, that criminal acts committed through the operation thereof may not be made the subject of criminal prosecutions, for it is well settled that the delinquent members of the firm are responsible for the acts of copartnership, and may be proceeded against for criminal offenses committed as copartners (31 Cor. Jur., sec. 235, p. 692; 20 R. C. L., sec. 131, p. 919)."

It can indeed be stated that the dearth of authority for treating a partnership as a "person" in criminal law bespeaks the established status of the law in that regard.

New Jersey has adopted the uniform partnership law. N. J. S. A. 42:1-6, Section 1, defines a partnership as follows:

> "A partnership is an association of two or more persons to carry on as co-owners a business for profit."

Hopla Trucking Company is a New Jersey Partnership.

These cases in New Jersey do not accept the entity theory of partnership. Guilt is personal to the individual partners and not to the partnership as an entity.

In the case of *Faulkner* v. *Whitaker*, 15 N. J. L. 438 (S. Ct. 1836), it was held that the individuals composing a partnership could be arrested but the firm cannot.

A partnership cannot make an affidavit; and an affidavit signed in a partnership name by one of the partners is insufficient and invalid. *Gaddis* v. *Durashy*, 13 N. J. L. 324 (1833).

A "Partnership" is not a legal entity distinct from partners but is a voluntary association of the partners to carry on as co-owners a business for profit. In New Jersey partnerships have no existence separate from its component members. *Neustadter* v. *United Exposition Service Co.*, 14 N. J. Super. 484 (1951); *X-L Liquors* v. *Taylor*, 17 N. J. 444 (1955), which case holds that the Common Law did not recognize the separate existence of partnerships, and required that all legal matters be maintained by and against the individual partners.

Appellee most strongly maintains that it is unreasonable to suppose that Congress intended to make widesweeping changes in the substantive law of partnership, in derogation of the common law nature of partnership and in direct conflict with the decisions under the Uniform Partnership Act which does not expressly and clearly dictate that result.

The Court relied heavily upon the corporate theory in holding the *Adams Express Co.*, (229 U. S. 381), subject to criminal liability.

There is no finding in the case of *United States* v. *Adams Express Co.*, even under the statute involved in that case, that a partnership, as a separate entity and distinguished from a joint stock association, would be subject to the statute involved in that case.

A partnership is not a separate entity but consists of the individual partners.

A partnership has no existence separate from its component members. A partnership is not a legal entity separate and distinct from its partners but is a voluntary association to carry on as co-owners a business for profit. *Neustadter* v. *United Exposition Service Co.*, 14 N. J. Super. 484 (Ch. 1951); *Randolph Products Co.* v. *Manning*, 83 F. Supp. 857; 176 F. 2nd 190 (C. A. 3) (1949).

Thus it follows that since a partnership for the purposes of criminal liability is not a separate entity, it is necessary to show that the partners had knowledge of the charges alleged.

In *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337 (1952), the Court made it clear that an essential element of the crime under said statute 18 U. S. C. 835 was

that Congress manifests a purpose to punish "only those who knowingly" violate the regulations. Knowledge is also an element in order to violate Sec. 222 (a) Motor Carrier Act. *United States* v. *Chicago Express, Inc.* (*supra*).

The government in the present case contends that a partnership is an entity separate from the partners who comprise it. The government seeks to create a fictional entity out of a simple partnership solely for the purpose of eliminating the necessity of proving guilty knowledge in the individual partners. The government fails completely to cite any authority to support its contention.

The government erroneously presumes that once an organization has been established as an entity, irrespective of the requirement of proof of a specific criminal intent in a statute, that vicarious criminal liability would automatically flow. Under Federal law, the decisions have not supported such a contention and there has been a refusal by the courts to extend vicarious criminal responsibility beyond corporations. *Brotherhood of Carpenters* v. *U. S.*, 330 U. S. 395.

Inasmuch as corporations are concerned, the guilty knowledge of its agents may be imputed to the corporation because a corporation can only act through its agents, and of course, a corporation can not be imprisoned. *Inland Freight Lines* v. *United States*, 191 F. 2d 313.

(c) Joint stock company.

The case of *United States* v. *Adams Express Co.*, 229 U. S. 381, cited by the government does not apply to the construction of said statutes or to the facts of the case at bar.

The case of *United States* v. *Adams Express Co.*, involved a joint stock company, which under the constitution and laws of the State of New York was regarded and treated as a corporation. Under law a joint stock company is not affected by the death of one of its members or change in its membership. Nor does it possess the unlimited agencies which are attributes of partners. In addition, the interest of a shareholder in a joint stock association is readily transferable and the shareholders enjoy limited liability.

(d) Criminal guilt is personal.

The criminal law is well established as to the rule that guilt is personal and that as to non-corporate employers, the civil law doctrine of respondeat superior does not apply.

United States v. *Kemble*, 198 F. 2d 889; *Lurding* v. *United States*, 179 F. 2d 419; *Nobile* v. *United States*, 284 F. 253. In *United States* v. *Kemble*, the court states at p. 892 as follows:

> "• • • In the Carpenters case, the Supreme Court reasoned that under the quoted language liability may not be predicated on a showing which would satisfy merely the requirements of the tort doctrine of *respondeat superior* or even the stricter normal criminal law doctrine which defines the area of 'corporate criminal responsibility for the acts of officers and agents in the course or scope of employment. • • • '" and at p. 893:
>
> • • • However, even normal criminal responsibility does not extend that far. In this regard the criminal law doctrine is so well settled that its exposition in contemporary judicial opinions is rare.

> However, some years ago in Nobile *v.* United States, 3 Cir., 1922, 284 F. 253, 255, this court did have occasion to point out that 'Criminal liability of a principal or master for the act of his agent or servant does not extend so far as his civil liability. He cannot be held criminally for the acts of his agent, contrary to his order and without authority, express or implied, merely because it is in the course of his business and within the scope of the agent's employment, though he might be liable civilly.' See also *United States* v. *Food and Grocery Bureau,* D. C., S. D. Cal. 1942, 43 F. Supp. 966, 971."

The government asserts from a mere examination of 1 U. S. C. 1 and Sec. 203 (a) Motor Carrier Act, that a partnership and co-partnerships are entities separate from the partners who comprise them.

The key to 18 U. S. C. 835, Section 222 (a) Motor Carrier Act, is the meaning of the words "whoever" and "knowingly" read in conjunction with the word "co-partnership" in Section 203 (a) Motor Carrier Act and "partnership" in 1 U. S. C. 1. These statutes do not define that relationship. Consequently, the word "partnership" and "co-partnership," must be given their plain established meaning since there is no contrary congressional intent expressed in 18 U. S. C. 835 and Section 222 (a) Motor Carrier Act.

The requirement of specific criminal intent as an essential element of the crime under 18 U. S. C. 835 and Sec. 222 (a) Motor Carrier Act manifests a congressional purpose to punish those who "knowingly violate the regulations."

The government's theory that a partnership is separate from the partners who comprise it is contrary to the very

nature of substantive law, both civil and criminal. In criminal law, guilt is personal, and as to non-corporate employers like the appellees herein, there can be no vicarious criminal liability.

The government in its brief failed to offer any authority in substantive law for considering a partnership as an entity separate from the partners who comprise it, for the purpose of criminal liability.

POINT II.

The cases cited by the government dealing with the personification of a partnership in civil law and those dealing with unincorporated associations and joint stock associations are not applicable to the case at bar.

While a partnership may be considered a legal entity for some limited civil procedural purposes, this concept has never been extended to the criminal law. The government, in its brief (p. 19), cites a Federal Rule of Civil Procedure and a section of the Bankruptcy Act as support for its contention that a partnership may be treated as a legal entity in criminal law exactly like a corporation.

Rule 17(b) of the Federal Rules of Civil Procedure permits a partnership to sue or be sued in the firm name. That Rule 17(b) is merely procedural and does not change the substantive law particularly with respect to criminal applicability is made clear in the case of *Koons* v. *Kaiser*, 91 F. Supp. 511 (S. D. N. Y.).

In that case five partners, three of whom resided in New York and two of whom resided in other states, brought a civil action in the Federal District Court for the South-

ern District of New York, basing jurisdiction on diversity of citizenship, against an individual who resided in California and a California and Nevada corporation, both of which maintained principal offices in California. The court held that the venue was improperly laid. In answering the contention of the plaintiff partners that the venue was proper since the residence of the partnership was in the Southern District of New York as its principal place of business was located there, the court stated (p. 516):

> "Rule 17(b) of the Federal Rules of Civil Procedure requires an examination of the law of the state to ascertain whether a partnership is a legal entity with a residence separate and apart from those of the partners. Section 222-a of the New York Civil Practice act permits a suit by and against a partnership in its partnership name, but it is clear that it was never intended to make a New York partnership a separate legal entity apart from that of the partners. It was merely a device to facilitate partnership litigation. Indeed, the Judicial Council which had recommended the adoption of Section 222-a stated in its Eleventh Annual Report at p. 233: 'It is assumed in the discussion of the validity of the recommended amendments, that the enactment of recommended section 222-a permitting suits by and against a partnership in the partnership name, together with present sections 12 and 21 of the Partnership Law [McK. Consol. Laws, c. 39] permitting partnerships to hold real property in the partnership name will not be held to have the effect of converting partnerships into legal entities having a separate existence from that of the partners. Such effect is believed to be unlikely.'
>
> See Caplan *v.* Caplan, 1935, 268 N. Y. 445, 198 N. E. 23, 101 A. L. R. 1223; William *v.* Hartshorn,

> 1946, 296 N. Y. 49, 69 N. E. 2d 557 (decided by the Court of Appeals after the enactment of Section 22(a)). * * *"

It is very significant to note that appellee, A. & P. Trucking Company, is a New York partnership.

The second example of so-called "personification of the partnership" advanced by the government is the treatment of a partnership as a legal entity in bankruptcy. The government cites *Liberty National Bank* v. *Bear,* 276 U. S. 215 (government brief p. 19), and *Meek* v. *Centre County Banking Co.,* 268 U. S. 426 (government brief p. 19), as authority for this proposition. Section 5 of the Bankruptcy Act was procedural and did not change the substantive law of partnership. This appears from the opinion in a recent case interpreting Section 5 of the Bankruptcy Act, namely *Mason* v. *Mitchell,* 135 F. 2d 599 (C. A. 9).

In *Mason* v. *Mitchell, supra,* the court affirmed a dismissal of a petition in bankruptcy on the ground that a "partnership is not bankrupt so long as anyone of the members who compose it is individually solvent." The court answered appellant's contention, that for bankruptcy purposes a partnership is a separate entity and thus the solvency of any partner is immaterial to the solvency of the partnership by stating in its opinion (pp. 600-601):

> "It is also urged that although the issue here has not been passed upon since the adoption of the 1938 Act, the most recent case of the Supreme Court on the subject, Liberty National Bank *v.* Bear, 276 U. S. 215, 48 S. Ct. 252, 72 L. Ed. 536, reveals a judicial adherence to the 'entity theory' which likewise compels the conclusion that the assets of a partner are not to be included in the determination of the solvency of a partnership.

> We do not agree with appellant's contention.
>
> First, the legal fiction of separate entity as applied to corporations or partnerships is purely a linguistic device utilized for conceptual convenience. It is not a premise to be reasoned from, but merely a shorthand statement of a conclusion. * * * Further, in answer to appellant's argument that Sec. 5 subs. a and b establish Congressional adoption of the 'entity' theory, it may be pointed out in Sec. 5, subs. c, i, and j are as clearly predicated upon the 'aggregate' theory * * *
>
> Second, the amendments made to Sec. 5 in the 1938 Act do not reflect an intent by Congress to work any far reaching changes in the substantive law of partnership. As was stated in House Report 1409, June 29, 1937, 75th Cong. 1st Sess., one of the purposes of the Act was to 'provide a more workable partnership section. * * *'
>
> * * * the changes in Secs. 5 and 18 were procedural in nature affording a more expeditious practice."

It is clear that the treatment of a partnership as a separate entity for limited *procedural* purposes does *not* change the *substantive* nature of that relation even in *civil* law.

In an attempt to identify simple partnerships with large collective bodies such as labor unions and trade associations, the government cites several cases in its brief wherein such associations have been treated as legal entities. The attempted analogy to the case at bar is erroneous for two reasons. First, unincorporated associations of the type involved in the cases cited are more closely comparable to corporations than to partnerships. Secondly, even where such associations are treated as entities the doctrine of *respondeat superior* does not apply insofar,

as charging vicarious criminal responsibility to the association for the acts of its agents.

In *United Mine Workers of America* v. *Coronado Co.*,[8] this Court by Chief Justice Taft, in holding a labor union amenable to *civil* suit, stated the reasons for treating a labor union as a separate entity (pp. 385, 388-389):

> "The membership of the union has reached 450,000. The dues received from them for the national and district organizations make a very large annual total, and the obligations assumed in traveling expenses, holding of conventions, and general overhead cost, but most of all in strikes, are so heavy that an extensive financial business is carried on, money is borrowed, notes are given to banks, and every way the union acts as a business entity, distinct from its members. No organized corporation has greater unity of action, and none is more power centered in the governing executive bodies. * * *
>
> It would be unfortunate if an organization as great power as this International Union has in the raising of large funds and in directing the conduct of 400,000 members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in the course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on his share of the strike fund, would be to leave them remediless. * * *"

The reasons for this rule of necessity are absent when we examine the nature of a partnership.

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[8] 259 U. S. 344.

Nor is the holding of this Court in *Brown* v. *United States*[9] of any aid to the government in its efforts to create fictional entity in the case of a partnership. In that case, strongly relied upon by the government, this Court held that a subpoena in a federal grand jury investigation under the Sherman Act could be directed to a manufacturer's association in its association name. The language quoted in the government's brief (pp. 20-21), must be taken in its proper perspective lest the wrong conclusions be drawn since this Court specifically stated (p. 142):

> "• • • While the subpoena *duces tecum* directed to the officer in possession of the documents would have been good, and perhaps preferable, the matter is not one of substance, but purely of procedure, and we entertain no doubt that the subpoena here directed to the association and served on such officer is valid."

The case of *United States* v. *Adams Express Co.*,[10] upon which the government relies so heavily, involved a joint stock association. This Court, as a basis for its decision that the Adams Express Company could be proceeded against in the company name for a violation *punishable by a fine*, discussed the corporate nature of joint stock associations. Justice Holmes stated in his opinion (p. 390):

> "• • • It is to be observed that the structure of the company under the laws of New York is such that a judgment against it binds only the joint property, National Bank *v.* Van Derwerker, 74 N. Y. 234, and that it has other characteristics of separate being. Westcott *v.* Fargo, 61 N. Y. 542. Matter of

[9] 276 U. S. 134.

[10] 229 U. S. 381.

> Jones, 172 N. Y. 575. Hibbs *v.* Brown, 190 N. Y. 167. Indeed Article VIII of the Constitution of the State, after providing that the term corporations * * * shall be construed to include all joint stock companies etc., having any of the powers or privileges of corporations not possessed by individuals or partnerships, as these companies do, Matter of Jones, 172 N. Y. 575, 579, goes on to declare that all corporations may sue and be sued 'in like cases as natural persons.' We do not refer to the law of New York in order to argue that by itself it would suffice to make applicable the principle of Liverpool & London Life & Fire Ins. Co. *v.* Oliver, 10 Wall. 566. We refer to it simply to show the semi-corporate standing that these companies already had locally as well as in the popular mind, and thus that the action of Congress was natural and to be expected, if we take its words to mean all that by construction they import."

Section 4, Article 10, of the Constitution of the State of New York, formerly Article 8, Section 3, reads as follows:

> "The term corporations as used in this section, and in sections 1, 2 and 3 of this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

The treatment of the Adams Express Company as a legal entity was natural when one considers its similarity to a corporation. Unlike a simple partnership, a joint stock association is not affected by the death of one of its members or change in its membership. Nor does it possess the

unlimited agency that is the attribute of partners. In addition, the interest of a shareholder in a joint stock association is readily transferable and the shareholders of the Adams Express Company enjoyed limited liability. Comparison of these attributes to the characteristics of a simple partnership such as appellee points up the absurdity of the government's attempted analogy.

There is no finding in the case of *United States* v. *Adams Express Company*,[11] even under the statute involved in that case, that a partnership, as a separate entity and distinguished from a joint stock association, would be subject to criminal liability in that case. The information in the case at bar charges a violation under Title 18, U. S. C., Section 835 and Section 206(a) Motor Carrier Act. The said information does not charge a violation of the statute which was involved in the case of *United States* v. *Adams Express Company*.

Secondly, the defendants in the case at bar are not a joint stock association but are partnerships consisting of partners against whom informations had been filed for alleged violations and dismissed on a motion to quash the information.

It is important to emphasize that the government has sought to liken a partnership to a corporation in order to establish a partnership as a separate entity. In the course of its attempted analogy the government has cited several cases dealing with unincorporated associations. Appellee believes it has demonstrated that the reasons for treating unincorporated associations as separate entities are inap-

[11] 229 U. S. 381.

plicable to the partnership relation. However, much more vital to the determination of the case at bar is the fact that the government, throughout its discussion of unincorporated associations, has presumed that vicarious criminal liability would automatically flow once a business organization has been established as an entity, notwithstanding the requirements of a specific criminal intent in a statute. None of the cases dealing with unincorporated associations cited in the government's brief discuss or even suggest that vicarious criminal responsibility would be imposed upon the association involved.

On the contrary, the decisions dealing with the criminal responsibility of associations refuse to extend vicarious criminal liability to associations even though such an organization partakes of some of the characteristics of corporations. In *United States* v. *Food and Grocery Bureau of Southern California, Inc., et al.*, 43 F. Supp. 966 (S. D. Cal.), the court refused to extend vicarious criminal responsibility for violations of the Sherman Act to trade associations. The court in its opinion stated (p. 973):

> "• • • Our law abhors crime by association. To say that a hundred grocers, bound together in a cooperative, should be found guilty of the violation of a statute of the United States because one or two of their officers or directors were also on the Board of the Bureau, would be applying to criminal law the civil law of agency. This cannot and should not be done."

The courts have also refused to extend this civil law doctrine to labor unions in *Brotherhood of Carpenters* v. *U. S.*, 330 U. S. 395, and *United States* v. *Kemble*, 198 F. 2d 889.

Certainly there is even more compelling reason not to extend vicarious criminal responsibility to a simple partnership considering the highly personal nature of that relationship as opposed to large collective groups such as labor unions or trade associations.

It is crystal clear that the necessity for a stricter rule of criminal responsibility in the case of a corporation is not present in the case of a partnership. The cases cited by the government in its brief dealing with the criminal responsibility of corporations are not authority for treating a partnership as an entity nor are they authority for extending vicarious criminal responsibility beyond corporations where a statute makes criminal intent an element of an offense. Under the circumstances, the government's parity of reasoning is without foundation.

In the case of *Gordon* v. *United States*, 203 F. 2d 249, which was reversed by this Court upon the government's confession of error, Circuit Judge Huxman, in his dissenting opinion states the reason for limiting vicarious criminal responsibility to corporations (p. 255):

> "Strong reliance is placed upon Inland Freight Lines *v.* United States, 191 F. 2d 313, by this court. But that case is clearly distinguishable. There the sole defendant was the corporation charged with keeping false records and it was held that the knowledge of its agents was the knowledge of the corporation. That is the well established principle of criminal law as applied in the case of a corporation. It is, as the law recognizes, the only way a corporation can be held criminally responsible for violations of penal statutes. While a corporation is recognized as a separate legal entity, such separate entity

> is a pure fiction of the law. As a separate entity and aside from its agents and employees a corporation can do nothing. It has no conscience, will, or power of thought. It acts only through its agent. Their acts are the only acts it can commit and their knowledge of necessity is the only knowledge it can have."

The law with regard to the criminal responsibility of *partnerships* was aptly stated in *United States* v. *Cohn*, 128 Fed. 615, 623-624:

> "It is a rule in criminal cases that a partner is not charged by the criminal acts of his copartners, or others acting in behalf of the firm, unless he has knowledge thereof. *The law in relation to partnership* is that the partner agrees to be bound for all acts done in obedience to the law, to which there are attached certain civil liabilities for fraudulent acts or representations done or made by a partner or an agent for the purpose of affecting the firm's business. It is not considered that, in the absence of some special statute bearing upon the particular acts of a firm, whereby each partner is made the subject of punishment, one partner can be found guilty of a crime because his partner or agent has done acts that would justify his or their punishment." (Emphasis supplied.)

The government should not be permitted to avoid the requirements of the statute and the principles of criminal law applicable to partnerships by a mere juxtaposition of the names of the defendant in an information. Such practice would violate the intendment of an Act of Congress.

POINT III.

The government's inability to prove the essential element of guilty knowledge under 18 U. S. C. 835 and Sec. 222(a) of the Motor Carrier Act cannot justify the elimination of that element of the crime by statutory construction.

By reading into 18 U. S. C. 835 and Sec. 222 (a) Motor Carrier Act, a Congressional purpose to create a partnership entity separate from the partners, the government seeks to relieve itself of the necessity of proving the specific criminal intent required by the statute. The government asks this Court not only to adopt its construction that a partnership is an entity separate and apart from the partners of whom it is comprised, but also asks that this Court judicially impose vicarious criminal liability upon this imaginary entity. In effect, the government requests that this court eliminate the essential element of intent which is the gravamen of 18 U. S. C. 835 and Sec. 222 (a) Motor Carrier Act. This is the sum and substance of the government's position in this case.

The government admits that guilty knowledge is a necessary element of the crime under 18 U. S. C. 835 and Sec. 222 (a) Motor Carrier Act (Brief, p. 26). *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337; *United States* v. *Chicago Express, Inc.*, 235 F. 2d 785; *St. Johnsbury Trucking Company* v. *United States*, 220 F. 2d 393. However, the government suggests in its brief (pp. 26-27) that the crimes alleged are not unlike a public welfare offense. The opinion in the *Chicago Express* case, *supra*, by the Court of

Appeals, Seventh Circuit, squarely deals with such contention. It states (p. 786):

> "By using the word 'knowingly' in Sect. 835, we think Congress, while describing a state of mind essential for responsibility, removed violations of the relevant regulations from the classification familiarly known as offenses malum prohibitum, public welfare and civil offenses * * *."

In the *Boyce* case, *supra*, this Court, in its opinion by Justice Clark, lucidly analyzed the offense under Section 835 (p. 342):

> "The statute punishes only those who knowingly violate the regulation. This requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the regulation would be so unfair it must be held invalid."

The government is endeavoring to circumvent this basic principle of criminal law by attempting to create a non-existent party to be charged with an offense, so that it can attribute to a non-corporate employer the criminal responsibility attributed to a corporation. In the present informations, by charging a partnership as an entity with a crime, the government is endeavoring to accomplish indirectly that which, as a matter of law, it cannot do directly.

The difficulty of sustaining the burden of proof imposed by the statutes is no reason for adopting an interpretation of the statute which would surely conflict with Congress' express requirement of specific intent. It is solely within the province of Congress to change the nature of the crimes. Chief Judge Magruder's concurring opinion in the *St.*

Johnsbury case, *supra* (at p. 398), confirms this view of the case:

> "* * * If it be thought that the indicated requirement of proof will seriously hamper effective enforcement of the Interstate Commerce Commission regulations, the answer is that Congress is at liberty to fix that up by striking out * * * 'knowingly' * * * as applied to violation of regulations of the sort here involved. That is to say, Congress could convert the offense into what sometimes has been called a 'public welfare offense', requiring no element of guilty knowledge or other specific *mens rea*, by providing that whoever, by himself or by agent, transports explosives, poison gas, flammable solids, or other dangerous commodities without the safeguards which may be prescribed by a lawful regulation of the Interstate Commerce Commission, shall be guilty of a public offense and subject to penalty. See the discussion in Morissette *v.* United States, 1952, 342 U. S. 246, 252-260, 72 S. Ct. 240, 96 L. Ed. 288."

The government suggests that many common carriers organized as partnerships would escape punishment for violating Interstate Commerce Commission regulations unless they may be charged with the intentional criminal acts of their employees as corporations are. It would indeed be equally specious for the government to contend that an individual doing business under a trade name may be charged as an entity separate from the individual himself where the government similarly lacked evidence of guilty knowledge in that individual. As far as criminal responsibility is concerned, a partnership is identically the same as an individual employer, except that, instead of one individual conducting business under a trade name, it is two or more individuals doing so.

Furthermore, to carry the government's contention to its logical conclusion, then individual partners who are proven to have had the requisite guilty knowledge could avoid imprisonment by claiming the partnership as an entity is liable for the violation and that they are not personally liable.

In its brief the government presumptuously asserts that in the case of a conviction under the instant informations, the individual partners of appellee cannot suffer imprisonment. In further stating that under the instant information "sanctions can be executed only against the funds of the company," does the government imply that without the entity fiction these funds would not be available for satisfaction of a fine? In the event the partnership did not have sufficient assets to satisfy the fine, could not the government then proceed against the personal assets of the individual partners? Manifestly, the question answers itself.

The statutes require the proof of guilty knowledge on the part of the partners in order to convict the partnership. The government admits that it has no such proof. Nevertheless, a conviction of the Partnership *as named* based upon the use of the principle of vicarious responsibility, would indelibly stamp the individual partners with a criminal conviction exactly as though they had been directly named separately as defendants. Such unseemly practice may serve the purpose of the government in the case at bar, but it would open the door to flagrant violations of the constitutional rights of citizens and would amount to the conviction of the individual partners without a trial.

Conclusion.

The order of the District Court dismissing the informations should be affirmed.

Respectfully submitted,

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